Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAUL L. BARRETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal statute that requires a judge to disqualify herself or himself in a proceeding in which the judge's impartiality might be reasonably questioned (28 U.S.C. § 455) implicitly requires a litigant to make a "timely" motion for recusal to preserve the issue for appeal.

2. Whether the enhancement of a defendant's sentence for "abuse of position of trust . . . in a manner that significantly facilitated the commission . . . of the offense" (U.S.S.G. § 3B1.3) is limited to cases where the defendant abused a position of trust vis-à-vis the intended victims of the offense.

LIST OF PARTIES

The names of all parties to the proceeding below appear in the caption of this case.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Paul L. Barrett, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on May 2, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 111 F.3d 947 (D.C. Cir. 1997) and is reproduced at Pet. App. A, *infra*, 1a-17a.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was issued on May 2, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The recusal statute, 28 U.S.C. § 455, 88 Stat. 1609, provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *
>
> (e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification

> enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

2. Section 3B1.3 of the United States Sentencing Guidelines provides in pertinent part:

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by **2** levels.

STATEMENT

1. Introduction

This petition presents two significant questions on which the federal courts of appeals are in conflict.

First, the petitioner seeks review of the D.C. Circuit's refusal to consider the merits of his argument that the district judge, to whom this case was tried, should have disqualified himself pursuant to 28 U.S.C. § 455. Although Section 455 is directed to the court and, unlike its companion provision with respect to judicial disqualification, 28 U.S.C. § 144, sets forth neither a procedural mechanism by which a party is required to raise a claim nor a time limit for doing so, the D.C. Circuit ruled that it had no obligation to consider the petitioner's Section 455 claim, which had been formally raised for the first time on appeal. *See United States v. Barrett*, Pet. App. A., *infra*, 8a-12a. The D.C. Circuit's creation of a "timeliness" requirement is consistent

with the rulings of several other circuits, including the Second, Fourth, Fifth and Eleventh Circuits, but is squarely in conflict with decisions in the Third and Ninth Circuits and also differs from the rules applied in the Seventh Circuit. The issue, bearing as it does on the appearance of judicial impartiality, is an important one that requires resolution by this Court.

Second, the petitioner seeks a writ of certiorari to resolve a conflict among the circuits with respect to the proper interpretation of the "Abuse of Trust" enhancement provision of the federal sentencing guidelines. *See* U.S.S.G. § 3B1.3. The Second, Third, Fourth, Sixth, Ninth and Tenth Circuits have interpreted the enhancement to apply only in cases where the defendant held (and abused) a position of trust with respect to the intended victim of the crime. In the present case, the D.C. Circuit applied a broader interpretation of Section 3B1.3 and affirmed the petitioner's 15-month sentence because he held a position of trust (as a county sheriff in Mississippi) that "substantially facilitated" his commission of the offense (a false statement to a grand jury in the District of Columbia). In light of the criminal justice system's need for uniformity and fairness in federal criminal sentencing, the conflict is an important one that warrants resolution.

2. Factual Background

The petitioner, Paul L. Barrett, is a former sheriff of Warren County, Mississippi. In August 1993, Sheriff Barrett was subpoenaed to testify before a federal grand jury in Washington, D.C., in connection with an investigation of a long-time friend, Mr. J.C. Herbert Bryant, Jr. The grand jury was investigating allegations that Mr. Bryant had unlawfully impersonated a special deputy U.S. marshal, made false statements about his status as such, and illegally

possessed firearms in the District of Columbia. These charges arose from an incident when Mr. Bryant had been detained and questioned by the D.C. Metropolitan Police when his truck, bearing a Mississippi license plate and equipped with blue lights, a siren and police radio, was found to contain several pistols and a placard on the dashboard stating "U.S. Marshal" while parked near the Mayflower Hotel, which was then hosting an Israeli diplomatic delegation.

Before the grand jury, Sheriff Barrett testified that he had appointed Mr. Bryant as a deputy sheriff and issued him a badge and an identification card in 1984. Pet. App. A, *infra*, 4a-5a. Sheriff Barrett also testified that Mr. Bryant had signed an oath of office in April 1987, which (although it "did not give him any law enforcement authority" beyond what every citizen of Warren County had) made Bryant a sworn deputy of Warren County. Gov't Exh. 50 (95-121(RCL)), at 43-58.

In July 1993, the grand jury indicted Mr. Bryant on false personation, false statement and misdemeanor firearm charges. He was tried by consent to the U.S. District Court for the District of Columbia (the Honorable Royce C. Lamberth). Mr. Bryant's principal defense to the firearms charge was that he was a duly authorized deputy sheriff of Warren County, Mississippi, and therefore exempt from the D.C. Code prohibition on possession of firearms. Pet. App. A, *infra*, 5a.

The government subpoenaed Sheriff Barrett to testify at Mr. Bryant's trial in October 1994. Upon appearing in Washington, D.C., however, Sheriff Barrett was informed by the government that his testimony would not be needed. Instead, trial counsel for Mr. Bryant called Sheriff Barrett as a witness. Sheriff Barrett testified about his 30-year

friendship with Mr. Bryant and stated that Mr. Bryant had been a deputy in his department since 1984. Sheriff Barrett identified the 1987 oath of office that he had previously identified before the grand jury, but when asked about the signature on the oath, admitted the possibility that he (Sheriff Barrett) had, with Mr. Bryant's permission, signed Bryant's name on the 1987 form. In addition, when asked on cross-examination about a motorcycle Mr. Bryant had once given him, Sheriff Barrett testified that he sold the vehicle for $1,500. The motorcycle had actually been sold for $10,000. Pet. App. A, *infra*, 6a.

On October 12, 1994, Judge Lamberth convicted Mr. Bryant on the false impersonation and false statement counts, but acquitted on the firearms charge, concluding that the government "failed to prove beyond a reasonable doubt that on September 2, 1992 Mr. Bryant was not a duly appointed sworn deputy sheriff . . . ." Tr. 10-12-94, at 8. The court credited Mr. Bryant's testimony that he had been sworn in as a deputy in April 1984, as corroberated by Sheriff Barrett's testimony regarding Bryant's 1984 appointment and by the court clerk's signature on Mr. Bryant's credentials. *Id.* at 8-9.

In March 1995, Sheriff Barrett became aware that a federal grand jury in Washington, D.C., was investigating him as the result of his testimony in connection with the *Bryant* case. At a meeting with Sheriff Barrett's attorney, the prosecutor, in an effort to convince Sheriff Barrett to accept a guilty plea, emphasized that Sheriff Barrett was a white, 30-year veteran of law enforcement in Mississippi and that the general jury venire in the District of Columbia was approximately 85% black. *See* Tr. 9-8-95, at 13, 16-17. In May 1995, Sheriff Barrett signed an agreement to plead guilty to one count of witness tampering, in connection with his understatement (at Bryant's trial) of the value of the

motorcycle that Bryant had given him. In early June 1995, however, Sheriff Barrett informed the government that he would not enter the guilty plea.

3. The District Court Proceedings

On June 13, 1995, a grand jury in the District of Columbia indicted Sheriff Barrett on two counts of witness tampering, one count of obstruction of justice, and two counts of making false declarations under oath. One of the false declaration counts was based on Sheriff Barrett's grand jury testimony regarding Mr. Bryant's signature on the 1987 oath of office. The other stemmed from Sheriff Barrett's trial testimony about the value of the motorcycle that Mr. Bryant had given him. Pet. App. A, *infra*, 7a.

At the government's request, the criminal action against Sheriff Barrett was assigned "related case" status with respect to the Bryant prosecution, and the matter was assigned to Judge Lamberth. Trial counsel for Sheriff Barrett objected to the "related case" designation, but Judge Lamberth denied the request for reassignment.

On September 8, 1995, during a pretrial hearing on various defense motions including a motion for change of venue, the government prosecutor invited Sheriff Barrett to consent to try the case to Judge Lamberth. Trial counsel for Sheriff Barrett responded, "You have heard the [*Bryant*] case, and I'm reluctant to try [this case] to you, and I don't mean that personally." Defense counsel continued, "And I think that your Honor wouldn't hear this without a jury, in my opinion, or shouldn't, in my opinion. Let me say that." Judge Lamberth responded, "If you wanted [a non-jury trial], it would be a very difficult thing I think." Tr. 9-8-95, at 55.

Sheriff Barrett's case was scheduled to be tried before a jury on October 2, 1995. On the morning of trial, defense counsel and the government reached an agreement to submit the case to the court on a stipulated record with respect to the two false declaration counts. (The remaining counts were severed and, ultimately, dismissed). The parties informed Judge Lamberth of the agreement, and the court asked for, and received, a waiver of Sheriff Barrett's right to a trial by jury. After the prosecutor's presentation of the stipulated record to the court, the government rested and the defense moved for judgment of acquittal. The principal contested issue was the materiality of the two declarations. The acquittal motion was briefed and argued before Judge Lamberth, who found Sheriff Barrett guilty on both false declaration counts on October 23, 1995.

On January 23, 1996, the Court sentenced Sheriff Barrett to 15 months' incarceration and imposed a fine of $2,000. Sheriff Barrett's sentence was enhanced by the trial judge, pursuant to § 3B1.3 of the United States Sentencing Guidelines, based on a finding that "the defendant abused his position of trust as sheriff, and that that abuse of trust did facilitate the commission of the offense." Tr. 1-23-96, at 16.

4. The D.C. Circuit's Ruling

Sheriff Barrett appealed his conviction and sentence. The D.C. Circuit affirmed the conviction based on Sheriff Barrett's grand jury testimony about Mr. Bryant's signature on the 1987 oath of office of deputy sheriff, holding that the misstatement was "material" to the grand jury's deliberations. The Court of Appeals reversed the conviction based on the trial testimony about the value of the motorcycle, concluding that the testimony "lacked the

'capability' or 'natural tendency' to affect the trial's outcome." Pet App. A, *infra*, 13a.

Sheriff Barrett also formally raised for the first time on appeal the issue of whether Judge Lamberth should have disqualified himself from presiding over Sheriff Barrett's trial, pursuant to 28 U.S.C. § 455. The D.C. Circuit observed that Section 455 does not always require recusal when a perjury bench trial involves testimony from a prior proceeding over which the same judge presided, but declined to address the facts of this case because "Barrett did not request recusal below and has therefore waived his right to do so here." Pet. App. A, *infra*, 9a. The court continued: "[W]hile section 455(a) contains no express timeliness provision, most circuits considering the matter have concluded that a litigant must raise the disqualification issue within a reasonable time after the grounds for it are known." *Id.*

In a concurring opinion, Judge Tatel disagreed with the conclusion that Sheriff Barrett had waived his right to question the court's impartiality on appeal. Judge Tatel stated (*id.* at 16a):

> Failure to move for recusal may lower the standard of appellate review, *see* Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."), but because section 455 requires judges to consider recusal *sua sponte* . . . , such failure cannot entirely bar appellate review of a judge's exercise of this statutory duty.

Thus, while he agreed that timeliness is a factor to be considered in evaluating a request for disqualification under Section 455, Judge Tatel expressed the view "that even an untimely recusal claim cannot deprive a circuit court of its responsibility to review a judge's failure to recuse." *Id.* at 17a [1] Judge Tatel concluded: "In my view, the integrity and public reputation of the federal judiciary require clear and firm answers on the merits to even delayed charges of judicial impropriety." *Id.*

Sheriff Barrett also contended on appeal that the district court misapplied the "Abuse of Trust" provision of the federal sentencing guidelines. Sheriff Barrett maintained that, notwithstanding his status as sheriff of Warren County, Mississippi, his conduct as a witness subpoenaed to testify before a grand jury in Washington, D.C., could not — as a matter of law — constitute "abuse . . . of a position of public or private trust . . . in a manner that significantly facilitated the commission . . . of the offense." *See* U.S.S.G. § 3B1.3. The D.C. Circuit rejected Sheriff Barrett's contention. Instead of determing whether Sheriff Barrett abused a position of trust vis-à-vis the intended victim of the offense in a manner that facilitated the commission of the false declaration offense, the D.C. Circuit considered it sufficient to conclude that Sheriff Barrett's position of public trust "'substantially facilitated' his false testimony" because "it was by virtue of his office that he was able to describe the circumstances surrounding the April 6, 1987 oath and to affirm that Bryant in fact affixed his own signature to it." Pet. App. A, *infra*, 15a. Accordingly, the court of appeals affirmed the application of the abuse of trust enhancement.

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[1] In addressing the merits of the disqualification issue, Judge Tatel expressed an opinion that Judge Lamberth had no duty to recuse himself in this case. *Id.* at 15a.

REASONS FOR GRANTING THE WRIT

I

THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS OVER THE EXISTENCE OF A "TIMELINESS" REQUIREMENT UNDER SECTION 455

Congress has enacted two complementary provisions that govern disqualification of judges in the federal courts: Sections 144 and 455 of Title 28.

Section 144 expressly requires a litigant to file a timely and legally sufficient affidavit setting forth the grounds believed to justify recusal. If the judge to whom a timely motion is directed determines that the required affidavit is legally sufficient, the motion must be referred to a second judge for a determination on the merits. 28 U.S.C. § 144.

Section 455, on the other hand, contains no explicit procedural requirements. It is directed to the judge, not the parties, and is self-enforcing. *See, e.g., Davis v. Board of Sch. Comm'rs*, 517 F.2d 1044, 1051 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989); *Christiansen v. Nat'l Sav. & Trust Co.*, 683 F.2d 520, 524 (D.C. Cir. 1982). Unlike Section 144, Section 455 does not require the filing of an affidavit to trigger disqualification. *See, e.g., Taylor v. O'Grady*, 888 F.2d 1189, 1200 (7th Cir. 1989); *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987). Nor does Section 455 contain an express time limitation for raising issues concerning the perceived partiality of a judge.

Nonetheless, the D.C. Circuit held in this case that a litigant who fails to ask the trial judge to recuse himself waives the right to appeal the recusal issue. The D.C. Circuit's creation of an implicit "timeliness" requirement with respect to disqualification of judges under Section 455 is consistent with the rulings of several other circuits. *See, e.g., United States v. Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995); *United States v. Owens*, 902 F.2d 1154, 1155-56 (4th Cir. 1990); *Delesdernier v. Porterie*, 666 F.2d 116, 121-23 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982); *United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983). It is, however, also directly contrary to rulings of the Third and Ninth Circuits, and inconsistent with the procedural rule applied in the Seventh Circuit. *See, e.g., United States v. Antar*, 53 F.3d 568, 572-73 (3d Cir. 1995); *Noli v. Comm'r*, 860 F.2d 1521, 1527 (9th Cir. 1988); *United States v. Balistrieri*, 779 F.2d 1191, 1204-05 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986).

In the Third Circuit, a litigant's claim that a trial judge violated Section 455 can be raised for the first time on appeal. In *United States v. Schreiber*, 599 F.2d 534, 536-38 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979), the Third Circuit considered whether a trial judge erred in failing *sua sponte* to recuse himself in a non-jury trial that resulted in a false statement conviction under 18 U.S.C. § 1001. As in the present case, the disqualification claim was based on Section 455 and had not been raised first in the district court. Unlike the D.C. Circuit, however, the Third Circuit applied a "plain error" analysis to the merits of the disqualification issue. The analysis of *Schreiber* has been applied uniformly in later Third Circuit decisions. *See United States v. Antar*, 53 F.3d at 572-73; *Osei-Afriyie v. Medical College of Pennsylvania*, 937 F.2d 876, 886-87 (3d Cir. 1991); *United States v. Dalfonso*, 707 F.2d 757, 760-61 (3d Cir. 1983).

With somewhat less consistency than the Third Circuit, the Ninth Circuit likewise has held that a litigant's "[f]ailure to move for recusal at the trial level . . . does not preclude raising on appeal the issue of recusal under § 455." [2] *Noli v. Comm'r*, 860 F.2d at 1527. *See also United States v. Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980); *but see United States v. Conforte*, 624 F.2d 869, 879 (9th Cir. 1980) (holding that the grounds for recusal of the trial judge under Section 455 cannot be raised for the first time on appeal in the absence of factors to excuse untimeliness), *cert. denied*, 449 U.S. 1012 (1980). [3] The decisions in which the Ninth Circuit has permitted parties to raise the Section 455 disqualification issue for the first time on appeal have stated that the appellant "'will bear a greater

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[2] The Sixth Circuit also has been inconsistent in its approach to the Section 455 timeliness question. In *In re Eagle-Picher Indus.*, 963 F.2d 855 (6th Cir. 1992), the Sixth Circuit stated that it was not required to address a claim that a bankruptcy judge should have recused himself because the issue had not been raised in the bankruptcy court, although the court determined that the claim would have been held to be meritless had the issue been reached. *Id.* at 862-63. In *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992), on the other hand, the Sixth Circuit considered the merits of a Section 455 claim despite the fact that no motion for recusal had been made below. *Id.* at 1482.

[3] The Ninth Circuit has also ruled, on several occasions, that it need not review an "untimely" motion to the district court pursuant to Section 455. *See, e.g., E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295-96 (9th Cir. 1992). Indeed, many appellate decisions have addressed whether such motions, made to the trial judge, may properly be rejected as untimely, with differing analysis and results. *See, e.g., Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415 (Fed. Cir.) (refusing to imply a *per se* timeliness requirement with respect to Section 455 motions made to the trial court), *cert. denied*, 490 U.S. 1047 (1989); *In re Kansas Public Employees Retirement Sys.*, 85 F.3d 1353 (8th Cir. 1996) (implying a timeliness requirement with respect to Section 455 motions made to the trial court).

burden on appeal in demonstrating that the judge . . . [erred] in failing to grant recusal under section 455.'" *Noli*, 860 F.2d at 1527 (quoting *Sibla*, 624 F.2d at 868). To prevail on appeal, the party seeking disqualification must demonstrate that "the district court erred in failing *sua sponte* to recognize obvious grounds for recusal under section 455 and to grant recusal pursuant to that section." *Sibla*, 624 F.2d at 868.

The Seventh Circuit has taken a different approach to the procedure for reviewing a trial judge's failure to disqualify himself or herself pursuant to Section 455(a). The issue of whether a litigant "waives" the right to enforce Section 455 by failing to make a timely motion to the district court appears to have first arisen in *SCA Servs., Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977) (per curiam). In *Morgan*, the Seventh Circuit wholeheartedly rejected the contention that the right to a judge whose impartiality cannot be reasonably questioned could be waived by a litigant's failure to make a timely motion. The Seventh Circuit held (557 F.2d at 117) (footnote omitted):

> The provisions [of Section 455] are mandatory; they are addressed to the judge and require that he disqualify himself in certain circumstances. They were adopted because the drafters of the statute believed "that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver." They impose no duty on the parties to seek disqualification nor do they contain any time limits within which disqualification must be sought. . . . Because it is obvious that any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of

> the statute, these defenses to the petition are without merit.

That view, that Section 455 "impose[s] no duty on the parties to seek disqualification," was later questioned in another Seventh Circuit decision, *United States v. Murphy*, 768 F.2d 1518, 1539-41 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). Without overruling *Morgan*, the court in *Murphy* stated that a criminal defendant who seeks to disqualify a trial judge under Section 455(a) must make an appropriate motion to that judge. [4] Since *Murphy*, the Seventh Circuit's approach to the review of Section 455(a) claims has changed even more. In *United States v. Balistrieri*, 779 F.2d 1191, 1204-1205 (7th Cir. 1985), the court held that such claims are not reviewable on direct appeal at all. Rather, the Seventh Circuit held, an appropriate motion to the trial judge must be followed by a timely petition for writ of mandamus. Thus, while the holding of *Morgan* — that there are no time limits on motions to disqualify under Section 455 — has not been expressly overruled, the prevailing rule in the Seventh Circuit appears to be that a litigant's claim pursuant to Section 455 is only reviewable upon the submission of a timely petition for writ of mandamus.

The issue presented in this petition — whether the appellate courts must consider the merits of a claim under Section 455(a) that was not raised in the trial court — is a straightforward one. Yet, it has engendered substantial disagreement and confusion among (and even within) the federal courts of appeals.

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[4] In *Morgan*, a motion to disqualify had been made to the district court, but was alleged to have been untimely because "numerous proceedings" had been had in the case since the existence of the potential basis for disqualification had become known. *Morgan*, 557 F.2d at 117.

II

THE SECTION 455 TIMELINESS ISSUE IS AN IMPORTANT ONE

The confusion among the federal courts of appeals with respect to whether a litigant may be time-barred from challenging the impartiality of the trial judge should be set to rest. Section 455 was enacted "to promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). That goal, which is clearly a laudable and important one, can only be accomplished by the uniform application of the governing standards and by the establishment of a consistent procedural mechanism for resolving issues concerning perceptions of partiality by the judiciary.

As the Seventh Circuit recognized in *Morgan*, the establishment of a timeliness requirement that would bar review of a party's Section 455 claim is wholly inconsistent with the language and purpose of the statute. *See Morgan*, 557 F.2d at 117. Section 455 is directed to the court, rather than the parties, and is written in mandatory terms. *See* 28 U.S.C. § 455(a) ("Any justice, judge, or magistrate of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned) (emphasis added). Unlike 28 U.S.C. § 144, Section 455 contains no explicit requirement that a litigant make a timely motion in the district court to preserve a disqualification challenge. Indeed, the legislative history of the 1974 amendments to Section 455 reveals that the Justice Department suggested that an explicit time limitation similar to that in Section 144 be added, *see* H.R. Rep. No. 93-1452 at 9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6358, but Congress did not incorporate the proposed limitation into the statute. Accordingly, the ruling of the D.C. Circuit in

this case is erroneous and stands to frustrate the purposes served by Section 455, which further supports a decision to grant a writ of certiorari to correct the error.

Finally, it is important for the courts (and litigants) to have clear rules with respect to matters of procedure. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring) ("Vague and obscure rules may permit judicial power to reach beyond its constitutional or statutory limits, or they may discourage judges from hearing disputes properly before them. Such rules waste judges' and litigants' resources better spent on the merits."). Vast amounts of time and resources, no doubt, already have been spent in litigation of the issue presented in this petition, as is amply demonstrated by the number of decisions that have encountered the question and the confusion they have produced.

III

THE D.C. CIRCUIT'S BROAD INTERPRETATION OF U.S.S.G. § 3B1.3 CONFLICTS WITH THE MORE LIMITED READING OF OTHER CIRCUITS

The D.C. Circuit's interpretation of Section 3B1.3 conflicts with the approach taken by other circuits that have limited the application of the "abuse of trust" enhancement to cases where the defendant abused a position of trust vis-à-vis the intended victim. Indeed, the rule adopted by the D.C. Circuit — that a defendant who holds a "position of trust" can be punished more severely based upon the mere existence of a factual nexus between the position and the crime — was addressed and rejected by the Sixth Circuit in *United States v. Moored*, 997 F.2d 139 (6th Cir. 1993), and by the Fourth Circuit in *United States v. Moore*, 29 F.3d 175 (4th Cir. 1994).

In *United States v. Moored*, the Sixth Circuit reviewed the sentence of a defendant who pleaded guilty in connection with a scheme to borrow money based on false promises and untrue representations. *Moored*, 997 F.2d at 140. The district court had enhanced the defendant's sentence pursuant to Section 3B1.3 based on two findings. First, the evidence showed that the defendant had represented to the lenders that part of the loan proceeds would be used to pay a debt to Jordan College, with which the defendant had an active history, including a term on its board of trustees. Second, the district court found that "because of his position with Jordan College, Defendant appeared to the victims to be a better candidate for a loan than most people." *Id.* at 144. Thus, the district judge construed Section 3B1.3 to authorize sentencing enhancement where (1) the defendant held a position of trust and (2) that position of trust facilitated the offense. *Compare Barrett*, Pet. App. A, *infra*, 14a-15a.

The Sixth Circuit disagreed, stating that by "[a]pplying the standard that the lower court applied, a sentencing court would enhance the sentence of virtually every defendant who occupied any position of trust with anyone, victim or otherwise." *Moored*, 997 F.2d at 145. In contrast to the legal analysis employed by the D.C. Circuit in *Barrett*, the Sixth Circuit held that the focus of the abuse of trust enhancement is on the relationship between the defendant and the intended victim of the crime: "In order for the abuse of a position of trust enhancement to be applied to a defendant, the evidence must show that the defendant's position with the victim of the offense significantly facilitated the commission of the offense." *Id.* Because the defendant in that case held no position of trust with respect to the defrauded lenders, the Sixth Circuit ruled that the enhancement was not appropriate.

In *United States v. Moore*, the Fourth Circuit reversed an enhancement of the defendants' sentences pursuant to Section 3B1.3 because, while they may have occupied positions of trust, the defendants did not abuse a position of trust with respect to the victims of the offense. *Moore*, 29 F.3d at 180. The Fourth Circuit noted that "[i]t is well-established that 'the question of whether an individual occupies a position of trust should be addressed from the perspective of the victim.'" *Id.* at 179-80 (quoting *United States v. Queen*, 4 F.3d 925, 928-30 (10th Cir. 1993), *cert. denied*, 510 U.S. 1182 (1994)); *see also United States v. Booth*, 996 F.2d 1395, 1396 (2d Cir. 1993); *United States v. Hill*, 915 F.2d 502, 506 n.3 (9th Cir. 1990)). In contrast to the D.C. Circuit's construction of Section 3B1.3, the Fourth Circuit held that "[t]here must be 'a trust relationship between the defendant and his victim' for the enhancement to apply." *Id.* (quoting *United States v. Hickman*, 991 F.2d 1110, 1112 (3d Cir. 1993)). [5]

As the Fourth Circuit recognized in *Moore*, 29 F.3d at 179, several circuits have held that "[f]or purposes of section 3B1.3, a position of trust, if any, must be established

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[5] In *Hickman*, the district court had enhanced the defendant's sentence pursuant to the "special skill" component of Section 3B1.3, based on a conclusion that, "if [the defendant] had not been a licensed contractor, the victims, who lived over a thousand miles away, would not have trusted him and believed his status reports without independent confirmation." *Id.* at 1112. The Third Circuit rejected the district court's analysis, concluding that it had conflated the enhancement for "abuse of trust" with that pertaining to "use of a special skill." The court held that "[t]o abuse a position of trust, a defendant must, by definition, have taken criminal advantage of a trust relationship between himself and his victim. . . . The additional wrong undergirding the upward adjustment is the corrupt abuse of that trust relationship." *Id.* On the other hand, the Third Circuit noted, Section 3B1.3 authorizes enhancement for use of a special skill even in the absence of a relationship between the defendant and victim. *Id.*

from the perspective of the victim." *United States v. Hill*, 915 F.2d at 506 n.3; *see also United States v. Castagnet*, 936 F.2d 57, 62 (2d Cir. 1991); *United States v. Booth*, 996 F.2d at 1396; *United States v. Queen*, 4 F.3d at 928-30; *cf. United States v. Boyle*, 10 F.3d 485, 488-89 (7th Cir. 1993) (focusing on the nature of the relationship between the defendant and victim); *United States v. Kosth*, 943 F.2d 798, 800 (7th Cir. 1991) (same). The legal analysis in each of these cases conflicts with the D.C. Circuit's application of the abuse of trust enhancement in *Barrett*.

IV

IT IS IMPORTANT THAT THE "ABUSE OF TRUST" ENHANCEMENT BE APPLIED UNIFORMLY ACROSS THE NATION

By construing the abuse of trust enhancement to apply whenever a loose factual nexus exists between a defendant's position of trust and the crime committed, the D.C. Circuit has established a rule that "would enhance the sentence of virtually every defendant who occupied any position of trust with anyone, victim or otherwise." *Moored*, 997 F.2d at 145. In effect, the D.C. Circuit's interpretation of Section 3B1.3 reads the word "abuse" out of the provision and applies the sentencing enhancement for any "signficant" factual connection between a position of trust and the crime. It is not the defendant's occupation of a position of trust, or even his "use" of that position, that provides the "additional wrong" which justifies the enhancement; only an "abuse" of the position legitimates the application of Section 3B1.3. *See Hickman*, 991 F.2d at 1112; *cf.* U.S.S.G. § 3B1.3 (authorizing enhancement where the defendant "*used* a special skill, in a manner that significantly facilitated the commission or concealment of the offense." (emphasis added)). As demonstrated above, the broad reach given to

Section 3B1.3 by the D.C. Circuit extends beyond that given the guidelines by other federal courts of appeals, including those by the Second, Third, Fourth, Sixth, Seventh, and Tenth Circuits.

The proper interpretation of Section 3B1.3 of the federal sentencing guidelines is an issue of importance, and one that has real consequences to the liberty interests of many individuals across the nation. The basic goal of the Sentencing Reform Act of 1984, pursuant to which the sentencing guidelines were developed, "was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system." U.S.S.G. Ch 1 Pt. A, ¶ 3 (The Basic Approach (Policy Statement)). Furthermore, "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *Id.* The primary objectives of the federal sentencing guidelines are to promote uniformity and fairness in the sentencing of persons convicted of federal crimes.

For Sheriff Barrett to be incarcerated, following a conviction in the District of Columbia, for any period of time in excess of that for which he would be confined as punishment for the same federal crime in another region of the country is contrary to both of these important principles. The pursuit of these Congressionally mandated objectives -- uniformity and fairness in sentencing -- justifies the issuance of a writ of certiorari to correct the decision of the D.C. Circuit and resolve the conflict among the circuits over this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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July 1997

APPENDIX

APPENDIX A
111 F.3d 947

UNITED STATES of America, Appellee,

v.

Paul L. BARRETT, Appellant.

No. 96-3009.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 28, 1997.

Decided May 2, 1997.

Appeal from the United States District Court
for the District of Columbia (No. 95cr00121-01)

John M. Colette, Jackson MS, argued the cause for the appellant.

William D. Weinreb, Assistant United States Attorney, argued the cause for the appellee. Eric H. Holder, Jr., United States Attorney, and John R. Fisher, Elizabeth Trosman and Mark H. Dubester, Assistant United States Attorneys, were on brief.

Before: GINSBURG, HENDERSON and TATEL, Circuit Judges.

Opinion for the court filed by Circuit Judge HENDERSON.

Concurring opinion filed by Circuit Judge TATEL.

KAREN LeCRAFT HENDERSON, Circuit Judge:

Appellant Paul L. Barrett appeals his conviction and sentences on two counts of making "a false material declaration" under oath in violation of 18 U.S.C. § 1623(a), [1] once before a grand jury investigating J.C. Herbert Bryant (Bryant) (count 4) and once at Bryant's subsequent bench trial (count 1). Barrett asserts that neither of the charged declarations was "material," as expressly required by section 1623(a), and that the district judge erroneously enhanced the sentences on each conviction. For the reasons set out below, we conclude that the grand jury declaration was material but that the trial declaration was

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[1] This section provides:

> (a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1623(a).

not. We further conclude that the sentence enhancement on count 4 was proper. [2]

I. BACKGROUND

On September 2, 1992, Bryant, a Virginia resident, drove his truck, outfitted with flashing lights, a siren and a police radio, into the District of Columbia and parked it outside the Mayflower Hotel, which was then hosting an Israeli diplomatic delegation. In the truck's rear compartment, in plain view, lay three 9 mm Beretta pistols, a .44 caliber magnum revolver, a .357 caliber magnum revolver and a .22 caliber derringer; in the front window was displayed a placard bearing the words "United States Marshal" in large bold print. The mobile arsenal eventually drew the attention of an Israeli security agent, the Mayflower Hotel's security director, two United States Diplomatic Security Service Agents and three Metropolitan Police Department (MPD) officers. When Bryant returned to the truck he explained to the MPD officers that he had left the weapons in the truck's rear compartment after a target shooting session at a northern Virginia firing range. He also claimed, according to trial testimony credited by the district judge, that he was a United States deputy marshal and had supporting credentials in a briefcase at home. In addition, he showed those present a Warren County, Mississippi Deputy Sheriff badge.

The MPD officers contacted the United States Marshal for the District of Columbia to determine whether Bryant was a deputy marshal. When the Marshal was unable to ascertain Bryant's status, despite repeated telephone inquiries to the

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[2] Because we reverse the count 1 conviction for lack of materiality, we do not reach Barrett's sixth amendment challenge to that conviction or his challenge to the district judge's enhancement of the count 1 sentence.

national Marshals Service headquarters in Virginia, he directed his deputies to bring both Bryant and the truck to the District of Columbia Marshals Service office. After a short time the Marshal released Bryant and his truck but retained the firearms. It was later determined that Bryant held no official position with the Marshals Service at that time, although he had been a "Special Deputy Marshal" for several successive one-year terms, the last of which ended on June 30, 1992.

About one month after the incident, on October 8, 1992, Barrett, then Sheriff of Warren County, Mississippi, wrote a letter at the request of Bryant and his lawyer addressed "To Whom It May Concern." The letter purported to "confirm that J.C. Herbert Bryant, Jr. is currently and has been continuously since April 9, 1984, a duly authorized Deputy Sheriff for Warren County, Mississippi" and averred that "[o]n September 2, 1992, Mr. Bryant was on a detail in the D.C. Metro areas performing duties as a Deputy Sheriff." Government's Record Material (Gov't Rec. Mat.) Tab O.

Over nine months later, in July 1993, Barrett was subpoenaed to appear before a grand jury investigating Bryant. On August 27, 1993 Barrett testified before the grand jury that Bryant was a "sworn" deputy sheriff and identified Bryant's signature on a certified copy of an oath of office dated April 6, 1987. The oath of office certificate bore the signature and seal of a Warren County court clerk. When asked about the "circumstances" surrounding the oath Barrett responded: "When he was sworn in, it was done in that clerk's office and they file it there then." Gov't Rec. Mat. Tab U at 34. Barrett further testified that he thought he had given Bryant "a badge and maybe a card" before that date but that "that doesn't have any authority with it until he was sworn in." *Id.* at 21. Later in his testimony he

identified a photocopy of a Warren County deputy sheriff badge and a deputy sheriff identification card, dated April 9, 1984, bearing the signatures of Barrett and Bryant and the signature and seal of the same clerk as appeared on the oath of the office certificate.

Almost two years after the Mayflower incident, on June 14, 1994, Bryant was indicted on 3 counts: (1) violating 18 U.S.C. § 912 in that he "did falsely assume and pretend to be a Special Deputy United States Marshal and in such pretended character, demanded and obtained that he not be arrested by the Metropolitan Police Department for possessing and carrying weapons in the District of Columbia"; (2) violating D.C. Code § 22-3204(a) in that he "did carry, openly, and concealed on or about his person, pistols, without a license issued as provided by law"; and (3) violating 18 U.S.C. § 1001 in that "in a matter within the jurisdiction of a department and agency of the United States, to wit, the United States Marshals Service, did knowingly make a false and fraudulent statement." Gov't Rec. Mat. Tab N.

Bryant was tried by consent by the district court in early October 1994, raising as a defense to the first and third counts that he never identified himself as a deputy marshal and as a defense to the second count that as a duly appointed deputy sheriff of Warren County, Mississippi he was exempt under D.C. Code § 22-3205(a) from the prohibition against carrying pistols without a license. [3] In support of the latter defense, Barrett testified at trial that he had "appointed" Bryant a "sworn" deputy in 1984 and "thought he was sworn in 1984, and he may be." Excerpt from 10/5/94 Trial Tr. at 34 (filed 10/26/94). Bryant testified with greater

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[3] D.C. Code § 22-3205(a) provides in part: "The provisions of § 22-3204 shall not apply to marshals, sheriffs . . . or their deputies. . . ."

assurance that Barrett took him to the courthouse in 1984 and "had [him] sworn by the clerk." Excerpt from 10/6/94 Trial Tr. at 14 (filed 11/3/94). Also during the trial Barrett again identified the same 1984 badge and identification card and the same April 6, 1987 oath of office certificate that he had originally identified before the grand jury. This time, however, he testified that he could not say for certain whether Bryant had personally signed the oath. When pressed on cross-examination, he admitted the "possibility" that he himself had signed Bryant's name on the oath. Excerpt from 10/5/94 Trial Tr. at 45 (filed 10/26/94). A subsequent analysis by the Federal Bureau of Investigation concluded that Bryant's signature on the oath "was written by" Barrett. Gov't Rec. Mat. Tab S. Barrett also acknowledged on cross-examination that he had received many benefits from his long-standing friendship with Bryant and his family, including hunting privileges on the Bryants' farm from Bryant's father, campaign contributions totaling about $1,000 from Bryant's mother, an expense-paid trip to Los Angeles from a law enforcement association headed by Bryant and a $4,600 loan and a motorcycle from Bryant himself. Barrett explained that he had "wrecked" the motorcycle and thereafter sold it to a Dr. Poole for $1500. Poole, who did not testify at Bryant's trial, had apparently earlier told investigating officers he paid Barrett $10,000 for the motorcycle.

On October 12, 1994 the district judge convicted Bryant on the first and third counts, finding that Bryant had misrepresented to various law enforcement officers on September 2, 1992 that he was a "Special Deputy United States Marshal" and that he had credentials at home to establish that status. The judge acquitted Bryant on count 2, concluding that the government "failed to prove beyond a reasonable doubt that on September 2, 1992 Mr. Bryant was not a duly appointed sworn deputy sheriff of the Warren

County Mississippi Sheriff's Office" [4] and that Bryant therefore came within the exception to section 22-3204's prohibition. 10/12/94 Trial Tr. at 8 (filed 11/30/94). The judge noted in particular that "Mr. Bryant's credentials as a deputy sheriff are . . . signed by clerk of court" and that "[t]here is no evidence that there is no 1984 oath on file, or of the circumstances of the clerk's signature and seal on Mr. Bryant's credentials." *Id.* at 8-9.

Nine months later, on June 13, 1995, a grand jury indicted Barrett on two counts of witness tampering in violation of 18 U.S.C. § 1512(b) (counts 2 and 3), one count of obstruction of justice in violation of 18 U.S.C. § 1503 (count 5) and two counts (those at issue here) of making false declarations under oath in violation of 18 U.S.C. § 1623(a) (counts 1 and 4). Specifically, count 1 charged Barrett with falsely testifying at Bryant's trial that he sold the motorcycle to Poole for $1500 (rather than $10,000) and count 4 charged him with falsely testifying before the grand jury that Bryant's signature on the April 6, 1987 oath of office certificate was in fact Bryant's.

The case was assigned to the same district judge who had tried Bryant. By agreement of the parties, counts 1 and 2 were severed and tried before the judge on stipulated facts. [5] On October 12, 1995 the judge found Barrett guilty of both counts and on January 23, 1996 he sentenced Barrett to two concurrent 15-month prison terms, to be followed by 2 years of supervised release, and fined him

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[4] While it is of no consequence here, we note that the trial judge seems to have misallocated the burden of proving a § 22-3205(a) defense which, under District of Columbia Law, rests on the defendant. *Middleton v. United States*, 305 A.2d 259 (D.C. 1973); *Williams v. United States*, 237 A.2d 539 (D.C. 1968).

[5] The other three counts were ultimately dismissed.

$2,000. The sentences were based in part on enhancements for breach of public trust on both counts and for obstruction of justice on count 1. Barrett appeals both the convictions and the sentences.

II. DISCUSSION

Initially, we consider briefly two general challenges Barrett raises to his convictions. First, Barrett argues there was insufficient evidence to support the convictions because the trial exhibits were never formally admitted into evidence but only marked for identification. We find no merit to this challenge. The exhibits were treated below, without objection, as if they were admitted into evidence; they are therefore deemed admitted. *See United States v. Bizanowicz*, 745 F.2d 120, 123 (1st Cir. 1984) (tape played for jury deemed admitted "where at least *a quo* there was no doubt that [it] was admitted, notwithstanding the judge's failure to instruct the courtroom deputy directly to mark the tape as an exhibit" and appellant did not object to playing); *United States v. Stapelton*, 494 F.2d 1269, 1270 (9th Cir.) (seven exhibits marked for identification but not formally offered or received into evidence deemed admitted where "[t]here was extensive testimony about each of them," "both parties, and the judge, acted as if they were in evidence, and the judge relied upon them in finding [the defendant] guilty" and "defense counsel raised no question about the exhibits not being in evidence"), *cert. denied*, 419 U.S. 1002, 95 S. Ct. 321, 42 L. Ed.2d 277 (1974).

We next reject Barrett's contention that the district judge was required to recuse himself under 28 U.S.C. § 455(a). [6]

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[6] This section provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

While recusal might well be prudent when a perjury bench trial involves testimony from a proceeding over which the same judge presided, section 455(a) does not require it. *See United States v. Parker*, 742 F.2d 127, 128-29 (4th Cir.) (§ 455 does not require judge to recuse himself from perjury prosecution for contradictory testimony at trial and hearing at both of which he presided), *cert. denied*, 469 U.S. 1076, 105 S. Ct. 575, 83 L. Ed.2d 514 (1984). In any event, Barrett did not request recusal below and has therefore waived his right to do so here. "More than one court has recognized the sensible principle that '[a] defendant cannot take his chances with a judge and then, if he thinks that the sentence is too severe, secure a disqualification and a hearing before another judge.'" *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990) (quoting *Taylor v. United States*, 179 F.2d 640, 642 (9th Cir. 1950)) (citation omitted). Thus, while section 455(a) contains no express timeliness provision, most circuits considering the matter have concluded that a litigant must raise the disqualification issue within a reasonable time after the grounds for it are known. *See United States v. Brinkworth*, 68 F.3d 633 (2d Cir. 1995) ("Although § 455 does not specify a time limit for application, a timeliness provision has been judicially implied. A party must bring a disqualification motion 'at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.'") (quoting *Apple v. Jewish Hosp.*, 829 F.2d 326, 333 (2d Cir. 1987) (internal citations omitted); *Owens*, 902 F.2d at 1156 ("Timeliness is an essential element of a recusal motion. . . . It is judicially implied in § 455."); *Delesdernier v. Porterie*, 666 F.2d 116, 121-22 (5th Cir.), *cert. denied*, 459 U.S. 839, 103 S. Ct. 86, 74 L. Ed.2d 81 (1982) (concluding that "timeliness may not be disregarded in all cases regarding disqualification under § 455(a)" and that "the facts of the present case are well suited to a timeliness requirement"); *In re Kansas Pub. Employees Retirement Sys.*, 85 F.3d 1353 (8th Cir. 1996)

("We have held in the past that even though § 455 has no express timeliness requirements, claims under § 455 will not be considered unless timely made.") (citations omitted); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) ("It is well established in this circuit that a recusal motion must be made in a timely fashion. . . . While there is no *per se* rule that recusal motions must be made at a fixed point in order to be timely, such motions 'should be filed with reasonable promptness after the ground for such a motion is ascertained.'") (citations omitted); *United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983) ("A motion to disqualify a magistrate under § 455(a) must be timely.") (citations omitted), *cert. denied*, 464 U.S. 1050, 104 S. Ct. 729, 79 L. Ed.2d 189 (1984). *But see SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 117 (7th Cir. 1977) (rejecting timeliness requirement because "any decision to deny disqualification based on grounds of waiver and estoppel would frustrate the purpose of [section 455]");[7] *cf. Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415 (Fed. Cir.) (finding no timeliness requirement for claims

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[7] The Seventh Circuit has since questioned the continuing force of the *Morgan* decision. *See United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985) (noting the "[*Morgan*] decision stands alone" but concluding that it "need not decide whether to reconsider *Morgan*"); *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 716-17 (7th Cir. 1986) ("It should not go unmentioned that Union Carbide may have waited too long to move to recuse [the trial judge]. . . . Although *SCA Services, Inc. v. Morgan, supra*, 557 F.2d at 117, holds that there are no time limits on motions to disqualify under 28 U.S.C. § 455, this position has been uniformly rejected in the other circuits. *See United States v. Murphy, supra*, 768 F.2d at 1539, and cases cited there. *Murphy* questions it and [*United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985)], cited earlier, undermines it by stressing the importance of promptly raising any ground for questioning the judge's impartiality. But in view of our other grounds for rejecting Union Carbide's argument for recusal under section 455(a), we have no need to decide whether this holding of *Morgan* should be reconsidered.").

under *subsection (b)* of section 455), *cert. denied*, 490 U.S. 1047, 109 S. Ct. 1956, 104 L. Ed.2d 425 (1989). Barrett was aware of the facts underlying his bias claim from the start. Accordingly, his attempt to raise it for the first time on appeal must be rejected as untimely. *See Delesdernier v. Porterie*, 666 F.2d at 122-23 ("[I]t cannot be seriously argued that Delesdernier or her counsel were unaware before trial began of facts which might arguably support a § 455(a) motion for disqualification. We think that the motion raised for the first time on appeal, and after two full trials on the merits, is too tardily made for us to consider it now.") (footnotes omitted); *Pedrina v. Chun*, 97 F.3d 1296, 1303 (9th Cir. 1996) ("Because the plaintiffs failed to raise their claims of judicial bias below, we will not consider them here.") (citing *E. & J. Gallo Winery*, 967 F.2d at 1295); [8] *United States v. Slay*, 714 F.2d at 1094 (where "counsel was aware prior to the hearing on the motion to suppress of the facts which he now contends support a § 455(a) motion," a disqualification argument raised first on appeal is "untimely and need not be considered by this Court on appeal"); *cf. United States v. Widgery*, 778 F.2d 325, 327 (7th Cir. 1985) (rejecting section 455(a) claim on appeal "[b]ecause [the

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[8] The holding in *Pedrina* is consistent with other recent Ninth Circuit decisions requiring a timely motion for disqualification under section 455(a). *See Davies v. Commissioner*, 68 F.3d 1129, 1130 (9th Cir. 1995) (rejecting on appeal as "not timely" disqualification argument made one year after grounds were known and after adverse judgement issued); *E. & J. Gallo Winery*, 967 F.2d at 1295 (concluding on appeal that disqualification claim first raised in motion for new trial was "not timely"); *see also United States v. Conforte*, 624 F.2d 869, 879 (9th Cir. 1980) (where defendant had "notice" before trial of alleged grounds for disqualification, disqualification claim first raised in new trial motion was untimely and its rejection unappealable). Two earlier Ninth Circuit decisions expressly stated that failure to move for recusal before the trial court "does not preclude raising on appeal the issue of recusal under § 455." *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 884-85 (9th Cir. 1991); *Noli v. Commissioner*, 860 F.2d 1521, 1527 (9th Cir. 1988).

defendant] never moved for disqualification in the district court," reasoning: "Disqualification for the appearance of impropriety runs prospectively only; even a successful motion does not vitiate acts taken before the motion was filed.") (citing *United States v. Murphy*, 768 F.2d 1518, 1539-41 (7th Cir. 1985)).

We now reach the heart of Barrett's appeal of his convictions, namely neither of his misstatements under oath was "material" to the proceeding in which it was made as required under 18 U.S.C. § 1623(a). [9] "The test of materiality is whether the statement 'has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination.' Proof of actual reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects." *United States v. Hansen,* 772 F.2d 940, 949 (D.C. Cir. 1985) (quoting *United States v. Diggs*, 613 F.2d 988, 999 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 982, 100 S. Ct. 2961, 64 L. Ed.2d 838 (1980) (alteration in original), *cert. denied*, 475 U.S. 1045, 106 S. Ct. 1262, 89 L. Ed.2d 571 (1986), *quoted in United States v. Dale*, 991 F.2d 819, 834 n.27 (D.C. Cir.), *cert. denied*, 510 U.S. 906, 114 S. Ct. 286, 126 L. Ed.2d 236, 510 U.S. 1030, 114 S. Ct. 650, 126 L. Ed.2d 607 (1993). Applying this deferential standard, we do not believe Barrett's misrepresentation of the motorcycle's sales price was material.

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[9] Barrett's counsel conceded the falsity of the representations before trial: "And to go to the nub of it, certainly we're not going to context [sic] that instead of $1,500 the motorcycle was sold for $10,000. And we're not going to contest that the signature that was on the oath of office in 1987 was that of — we're not going to say it was Bryant's signature. . . . [W]e are in effect embracing the alleged falsity of the two counts. . . ." Gov't Rec. Mat. Tab C at 6-7.

The government would have us believe the misstatement had the potential to mislead the district judge regarding the motorcycle's value when Barrett received it from Bryant and thereby to diminish Barrett's bias toward Bryant, leading the district judge to credit Barrett's testimony regarding Bryant's status and, based on that testimony, to find that on September 2, 1992 Bryant was a deputy sheriff and therefore authorized to possess firearms in the District of Columbia under section 22-3205(a). We reject this tortuous reasoning. Even assuming Barrett's misrepresentation of the price at which he sold the motorcycle to Poole suggested the motorcycle was less valuable when Bryant gave it to Barrett than it in fact was, it is highly improbable that the difference in value would lead a fact finder to consider Barrett significantly less biased or less likely to testify in Bryant's favor given Barrett's considerable testimony about his long and beneficial relationship with Bryant and Bryant's family. Viewed against that background, the single gift of a motorcycle seems a rather trifling matter and Barrett's misrepresentation of its sales price even more so. In addition, Barrett's testimony constituted only a minor component of the substantial trial evidence, including the unchallenged 1984 badge and identification card, that convinced the judge Bryant was a bona fide Warren County deputy on September 2, 1992. Given the other, far more persuasive evidence of Bryant's status, it is difficult to conceive that the credibility of Barrett's corroboration would much matter to the finder of fact. In short, Bryant's misrepresentation regarding the motorcycle sales price lacked the "capability" or "natural tendency" to affect the trial's outcome that is necessary for a finding of materiality.

By contrast, Barrett's misidentification of Bryant's signature on the April 6, 1987 oath of office certificate was material to the grand jury decision whether to indict. The test of materiality in a grand jury investigation is

substantially the same as at trial, although we have stated that "[m]ore specifically, in a grand jury setting, the false testimony must have 'the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation'" and that "the effect necessary to meet the materiality test is relatively slight, and certainly not substantial." *United States v. Moore*, 613 F.2d 1029, 1038 (D.C. Cir. 1979) (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970)), *cert. denied*, 446 U.S. 954, 100 S. Ct. 2922, 64 L. Ed.2d 811 (1980). Under our precedent Barrett's misrepresentation to the grand jury had the "natural tendency" to influence its investigation.

Whether Bryant violated D.C. Code § 22-3204 by unlawfully carrying pistols in the District depended entirely on whether he came within the section 22-3205(a) exemption. The authenticity of Bryant's signature on the April 6, 1987 oath, indicating that he was sworn in on that date, was critical to the grand jury's resolution of the issue. Unlike the district judge, the grand jury heard no testimony that Bryant was sworn in at any other time and Barrett himself stressed to the grand jury that the badge and the 1984 identification card conferred no authority on Bryant "until he was sworn in." Thus, if the grand jurors determined Bryant had not been sworn in on April 6, 1987, they would most probably also conclude he was not a duly appointed deputy sheriff and not exempt from the prohibition of section 22-3204. We therefore conclude that Barrett's false authentication of the April 16, 1987 oath signature constituted a "false material declaration" within the meaning of 18 U.S.C. § 1623.

Finally, Barrett challenges the district judge's enhancement of his sentence on count 4 for abuse of public trust under section 3B1.1 of the United States Sentencing Guidelines. Barrett does not dispute that his position as sheriff was one

of public trust but argues that his testimony before the grand jury could not have been an abuse of that position because he testified only in his individual, not in his official, capacity. We reject this argument as well. Section 3B1.1 provides for a 2-level enhancement "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense." There can be little doubt, if any, that Barrett's position as sheriff "substantially facilitated" his false testimony. It was by virtue of his office that he was able to describe the circumstances surrounding the April 6, 1987 oath and to affirm that Bryant in fact affixed his own signature to it. Thus, according due deference to the district judge's conclusion that Barrett abused his office so as to facilitate significantly his false identification of Bryant's signature, we affirm the two-point enhancement. *See United States v. Broumas*, 69 F.3d 1178 (D.C. Cir. 1995) (district court's application of abuse of trust enhancement "receives due deference" on appeal), *cert. denied*, __ U.S. __, 116 S. Ct. 1447, 134 L. Ed.2d 566 (1996).

For the preceding reasons, we reverse Barrett's conviction on count 1 and affirm his conviction on count 4. We further affirm the breach of trust enhancement of the sentence on count 4. Accordingly we remand for the district court to resentence Barrett on count 4 only insofar as his sentence on that count may be affected by our reversal of the count 1 conviction.

So ordered.

TATEL, Circuit Judge, concurring:

I agree that the district judge had no obligation to recuse himself under 28 U.S.C. § 455(a). Maj. Op. at 951. As the Supreme Court explained in *Liteky v. United States*,

"opinions formed by [a] judge on the basis of facts introduced or events occurring in the course of present proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism...." 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L. Ed.2d 474 (1994); *see also United States v. Roach*, 108 F.3d 1477, 1483-84 (D.C. Cir. 1997). "Judicial rulings alone," the Court announced, "almost never constitute a valid basis for a bias or partiality motion[.] ... [o]nly in the rarest circumstances [do they] evidence the degree of favoritism or antagonism required...." *Liteky*, 510 U.S. at 555, 114 S. Ct. at 1157. Because Barrett argues for recusal on the basis of knowledge the district judge acquired and rulings it made in the course of Bryant's trial and Barrett's proceedings and because he makes no allegation of "deep-seated favoritism or antagonism," the judge was not required to recuse.

I disagree, however, with the court's further, and apparently unnecessary, statement that "Barrett did not request recusal below and has therefore waived his right to do so here." Maj. Op. at 951. Unlike 28 U.S.C. § 144, which provides for recusal upon motion by a party, section 455(a) imposes an independent obligation on judges: "Any justice, judge, or magistrate of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (emphasis added). Failure to move for recusal may lower the standard of appellate review, *see* Fed. R. Crim. P. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."), but because section 455 requires judges to consider recusal *sua sponte*, *Christiansen v. National Sav. & Trust Co.*, 683 F.2d 520, 524 (D.C. Cir. 1982), such failure cannot entirely bar appellate review of a judge's exercise of this statutory duty. *See, e.g., Noli v. Commissioner*, 860

F.2d 1521, 1527 (9th Cir. 1988) ("Failure to move for recusal at the trial level ... does not preclude raising on appeal the issue of recusal under § 455."); *United States v. Schreiber*, 599 F.2d 534, 535-36 (3d Cir. 1979) (applying plain-error review to recusal claim first raised on appeal); *cf. United States v. Walker*, 473 F.2d 136, 138 (D.C. Cir. 1972). Although I agree that timeliness is a factor to be considered, the obligation section 455(a) places on judges means that even an untimely recusal claim cannot deprive a circuit court of its responsibility to review a judge's failure to recuse. In my view, the integrity and public reputation of the federal judiciary require clear and firm answers on the merits to even delayed charges of judicial impropriety.